

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KARIEM THOMPSON	:	CIVIL ACTION
	:	
v.	:	
	:	
GERALD L. LOZUM, et al.	:	NO. 05-02503-JF

MEMORANDUM AND ORDER

Fullam, Sr. J.

September 21, 2005

The United States Magistrate Judge to whom this habeas corpus case was referred has filed a report recommending that the petition be dismissed without prejudice, for failure to exhaust state remedies. The report notes that, as of the date of the report, the time within which petitioner might appeal the state court's denial of collateral relief had not entirely expired; and that this petition is "mixed" - i.e., the petition includes both exhausted and unexhausted claims.

Ordinarily, I would agree with the Magistrate Judge. But because of the unusual posture of this case, further exhaustion of state court remedies should not be required. Petitioner's sentence was imposed in February 1999. His direct appeal was not decided by the Superior Court until December 4, 2003, more than four years later. The Pennsylvania Supreme Court denied allocatur on May 4, 2004. Promptly thereafter, on July 21, 2004, petitioner sought relief in the trial court pursuant to the PCRA. That application had not yet been acted upon when

petitioner filed the present habeas corpus action, on May 26, 2005. On August 5, 2005, the state trial court dismissed the PCRA application.

In his direct appeal, petitioner asserted several seemingly colorable claims, several of which challenged the adequacy of his legal representation at trial. On direct appeal, the Superior Court did not reach any of the substantive issues. As to some, trial counsel had failed to preserve the issue. As to others, appellate counsel had failed to brief the issue. Having thus found that both trial counsel and appellate counsel had apparently failed to provide adequate representation, the Superior Court nevertheless declined to consider the issue of effectiveness of counsel, because of procedural reasons (such claims should be raised in collateral attacks, not on direct appeal).

There is no explanation in the record as to why the PCRA courts have rejected the claims of counsel's ineffectiveness - a result which, one would think, is directly contrary to the reasoning of the Superior Court on direct appeal.

Be all that as it may, I am satisfied that, under the principles set forth in Lee v. Stickman, 357 F.3d 338 (3d Cir. 2004) and the cases cited therein, no further delay should be required. This case will be returned to the Magistrate Judge for

a further report and recommendation addressing the merits of the habeas corpus petition.

An Order follows.

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ORDER

AND NOW, this 21st day of September 2005, upon consideration of the Report and Recommendation of United States Magistrate Judge Rapoport, and petitioner's objections thereto, IT IS ORDERED:

That this case is returned to United States Magistrate Judge Rapoport for consideration of the merits of the habeas petition, and a further report and recommendation addressing the merits.

BY THE COURT:

/s/ John P. Fullam  
John P. Fullam, Sr. J.